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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-539

AVONSIDE NURSING HOME, INC.,
Petitioner,

vs.

ELLIOTT L. RICHARDSON, Secretary of Health,
Education and Welfare,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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The petitioner, Avonside Nursing Home, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 27, 1973.

OPINION

No written opinion was rendered by the District Court for the Eastern District of Michigan, Southern Division, when it granted respondent's Motion to Dismiss. The pertinent oral reasons and its order are set forth in Appendix A to this petition. No opinion was rendered by the Court of Appeals; its original order and the order denying a petition for rehearing are likewise, set forth in Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 17, 1973, a timely petition for rehearing was denied on June 27, 1973. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether federal jurisdiction existed and petitioner had standing to resort to the District Court prior to exhausting all of its administrative remedies based upon assertion of:

a) Denial of due process and violations of the Freedom of Information Act by the Department of Health, Education and Welfare in failure to issue a subpoena for the production of HEW records; and,

b) The incapability of obtaining relief from the Department of Health, Education and Welfare because it lacked power over the subject matter and it provided inadequate administrative remedies.

STATUTORY PROVISIONS INVOLVED

United States Code. Title 5:

§552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) (3) Except with respect to the records made available under Paragraphs (1) and (2) of this subsection, each agency on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

United States Code, Title 5:

§554 Adjudications

(d) (1) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate.

STATEMENT OF THE CASE

The petitioner is a duly licensed nursing home operating in Detroit, Michigan. The ownership of the facility was transferred and the management was changed in 1970.

On October 5, 1971, the Department of Health, Education and Welfare notified the petitioner that its provider agreement was terminated. A provider agreement allows an extended care facility to participate under Title 18 of the Social Security Act. (Commonly known and hereafter referred to as "Medicare".)

The petitioner contested this action and the administrative body's jurisdiction, alleging that its current management had never participated under "Medicare", that no "Medicare" patients were in the facility, and that no provider agreement existed under its new ownership.

The petitioner filed for an administrative hearing with the Department of Health, Education and Welfare and

then requested that certain subpoenas issue to make it possible to prepare its defense.

The subpoenas requested the presence of a Director of the Bureau of Health Insurance and the production of department records regarding waivers granted facilities for deficiencies under "Medicare".

The Deputy Regional Attorney for the respondent wrote a letter of objection about issuance of these subpoenas to the Hearing Examiner. Without any notice or opportunity to the petitioner to contest the allegations of the regional attorney, the Hearing Examiner advised appellant, by telephone, that he would not issue the subpoenas.

Whereupon appellant, on June 9, 1972, then filed suit in the United States District Court for the Eastern District of Michigan, Southern Division, alleging violation of the Admnistrative Procedure Act, which allows production of documents relating to freedom of information, that the hearing was nullity, that the hearing was prejudicial and would cause the appellant irreparable harm, and that a District Court should decide the legal issue of the jurisdiction over the appellant.

On October 31, 1972, the District Court dismissed the action for failure of the petitioner to exhaust its administrative remedies.

The Court of Appeals for the Sixth Circuit affirmed the District Court judgment.

REASONS FOR GRANTING THIS WRIT

1) THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF TITLE 5, U.S.C.A., §552 (a) (3).

Section 552(a)(3) of Title 5 provides:

"On complaint, the district Court of the United States in the district in which the complainant resides, or has his principal place of business or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the prduction of any agency records improperly withheld from the complainant. In such a case, the court shall determine the matter de novo and the burden is on the agency to sustain its action."

The Information Act, enacted in 1966 and effective in 1967, is an amendment of §552 of the Administrative Procedure Act.

The Sixth Circuit has here upheld the District Court fr the Eastern District of Michigan's denial of the issuance of a temporary restraining order based on an alleged violation of the Freedom of Information Act.

Although no opinion was written, this interpretation conflicts with that adopted by the District of Columbia Circuit in *Bannercraft Clothing Company, Inc. v. Renegotiation Board*, 466 F. 2d 345 (C.A. D.C. 1972); *certiorari granted*, 41 U.S.L.W. 3403-3404, and *Bristol-Meyers Company v. F.T.C.*, 424 F. 2d 940 (C.A. D.C. 1970).

The District of Columbia Circuit determined that the legislative history of the Act made clear Congress's in-

tent to mandate access to certain agency information without having to justify need or without requiring a balancing of equities by the court.

Bannercraft Clothing Company, Inc., v. Renegotiation Board, 466 F. 2d 345, 352 (CA D.C., 1972).

Thus, since temporary stays of pending administrative procedures may be necessary on occasion to enforce the policy of the Freedom of Information Act, a District Court has jurisdiction to issue such stays.

Clearly, the District Court of Michigan did not examine this jurisdictional issue because it got caught up in the general argument that no party is entitled to judicial relief for a threatened injury until the administrative remedies have been exhausted.

As the Act is fairly new, and the District Court did not specifically address the jurisdictional question, petitioner's argument is that jurisdiction did exist and now justifies the grant of certiorari to review the judgment below.

2) THE DECISION BELOW CONFLICTS WITH THE DECISION OF OTHER COURTS OF APPEAL AND THE UNITED STATES SUPREME COURT CONCERNING THE PROPER INTERPRETATION THAT JUDICIAL RELIEF NEED NOT BE DENIED UNTIL ADMINISTRATIVE REMEDIES HAVE BEEN EXHAUSTED.

Great reliance on the general rule of *Myers v. Bethlehem Corporation,* 303 U.S. 41, 58 S. Ct. 459, 82 L.Ed 638 (1938), was made by the District Court of Michigan which dismissed appellant's original complaint.

The Supreme Court has provided that judicial relief in absence of exhaustion of administrative remedies is possible and as stated in *McKart v. United States,* 395 U.S. 185 193, 89 S. Ct. 1657, 1662, 23 L. Ed. 2d 194, 203 (1969), the exhaustion doctrine is well established, "but that is subject to numerous exceptions."

In *Leedom v. Kyne,* 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 210 (1958), the court found that when an administrative agency, such as NLRB, is clearly acting beyond its jurisdiction, exhaustion is not required.

Generally, a court should not interfere with the operation of administrative agencies unless exceptional circumstances exist. The Supreme Court has upheld relief of a federal injunction in a state optometry case under the Civil Rights Act, 42 U.S.C. §1983. *Gibson v. Berryhill,* 36 L. Ed. 2d 488, 93 S.Ct. 1689, (1973).

The various circuits have cited exceptions to the strict rule in a variety of selective service situations. The Ninth Circuit has stated that where the facts are uncontested and no discretion is involved, administrative action is subject to judicial review, notwithstanding want of exhaustion of administrative remedies, whether applicable

law involves statute, administrative regulation or court decision. *United States v. Hayden,* 445 F. 2d 1365, (CA 9, 1971).

The Fourth Circuit has said that the essence of the exhaustion concept is flexibility. See *United States ex rel Brooks v. Clifford,* 409 F. 2d 700 (CA 4, 1969).

The District of Columbia Circuit has stated that interim injunctive relief pending an administrative determination is not interference with agency action, but serves as an aid to the administrative process by preserving the status quo if it prevents irreparable harm. *Murray v. Kunzig,* 462 F. 2d 871, 874, 875 (CA D.C. 1972).

In the District of Columbia Circuit, equitable intervention in a pending administrative procedure has also been supported while the status of contested documents was litigated. See *Bannercraft v. Renegotiation Board,* 466 F. 2d 345, 354 (CA D.C. 1972), *certiorari granted,* 41 U. S. L.W. 3403-3404, and *Bristol-Meyers v. F.T.C.,* 424 F. 2d 940 (CA D.C. 1970).

No court requires exhaustion when exhaustion will involve irreparable injury and when the agency is clearly without jurisdiction. See generally, K. Davis, *Administrative Law Treatise,* §20.05, (Supp. 1972).

Among the unanswered questions in the case at bar thus posed are: Could the Department of Health, Education and Welfare have exclusive jurisdiction to hear this case to its finality without jurisdiction in the first place? Does the Department have affirmative power to terminate a contract which a party claims does not exist?

The emphasis of the *McKart* opinion was on avoiding impairment of the administrative process, but such an interruption is less damaging when the question for review

is statutory interpretation than when it is exercise of discretion or application of expertise. *McKart v. United States,* 395 U.S. 185, 194, (1969).

Appellant contends that statutory interpretation existed in two (2) areas. One, in the area of whether jurisdiction existed at all under the government election to terminate this provider agreement under 42 U.S.C. 1395 cc (b)(1).

Secondly, did the hearing examiner violate the Freedom of Information Act by refusing the petitioner's properly requested subpoena and did he violate due process guaranteed by U.S.C.A. §554 (d) (1) by not allowing petitioner to reply to a written memorandum used by Counsel for the Department of Health, Education and Welfare.

Again, these conflicts justify the grant of certiorari to review the judgment below.

3) THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS BECAUSE IT CAN ULTIMATELY OUTLINE THE JURISDICTIONAL LIMITATIONS OF ADMINISTRATIVE PROCEEDINGS IN THE AREA OF HEALTH CARE DELIVERY AND CAN DEFINE ALLOWABLE ATTEMPTS TO CIRCUMSCRIBE THE ADMINISTRATIVE HEARING PROCESS.

The Sixth Circuit's opinion in this case reflects important statutory and policy considerations growing out of legitimate efforts of health care providers to invoke federal jurisdiction under the Freedom of Information Act and Administrative Procedure Act. Efforts to create federal jurisdiction are common in nursing home facilities, and litigants and lower courts urgently need the assistance of this Court in understanding the following:

(1) The effects of the language and policy of the Freedom of Information Act in relation to contesting Federal Agency action under the Social Security Act;

Bannercraft Clothing Co. v. The Renegotiation Board, 466 F. 2d 345 (CA D.C. 1972), has the closest factual situation. The Court has granted certiorari to *Bannercraft,* 41 U.S.L.W. 3403-3404, but it will not answer the specific question here raised where the Social Security Act has specific statutes, 42 U.S.C. 405 (h) and 42 U.S.C. 405 (g) which require exhaustion of administrative remedies.

(2) Whether the interpretation of a section of the Social Security Act concerning extended care facilities so involves special administrative expertise on the question of agency jurisdiction that it requires exhaustion of administrative remedies.

The limits of the concept of administrative exhaustion have been set by *McKart v. United States,* 395 U.S. 185, 23 L.ed 2d 194, (1969), and *McGee v. United States,* 402 U.S. 479 (1971).

Between these two lines of decision lies a gray area where Courts have carved out exceptions like *Aquavella v. Richardson,* 437 F. 2d 397 (CA 2, 1971) where the second Circuit looked behind the fact of the administrative matter into what actually occurred.

When a health care provider argues irreparable injury, it may be arguing, as here, that the administrative process won't function properly until it is given procedural due process and allowed to subpoena all necessary records necessary for preparation of its case. Though the decision of a case like this isn't final on its merits, a party has exhausted all of its administrative remedies for production of documents which the Freedom of Information Act provides. See *Bannercraft Clothing Co. v. Renegotiation Board,* 466 F. 2d 345, 358 (CA D.C. 1972).

These Circuits recognized the gray area of decision by the Court and sought to reconcile them. The time has come for the Court to clarify and define the exceptions more specifically.

Finally, the correctness of the decision below, even presuming the statutory tests employed, is open to question. The parties basically agreed on the statement of facts that there was an attempt to transfer ownership of the health care facility in 1970, that no Provider Agreement was signed by the present management, and that there were no "medicare" patients in the facility. Thus, whether there exists in H.E.W. jurisdiction to decide on the alleged termination of this provider agreement would be strictly one of the statutory interpretation of 42 U.S.C. 1395 cc (b) (2).

Since there is no compelling governmental interest (i.e. the hearing is not related to any medicare patient or government monies) and there is no need of administrative expertise, a judicial review on jurisdiction of the agency should be allowable under the concept of *McKart v. United States*, 395 U.S. 185, at 197 23 L. Ed. 2d 194 at 205 (1969).

Appellant was clearly not asking the lower Court to decide the ultimate merits of whether it violated H.E.W. regulations on the conditions of participation prescribed by Federal Law. The apparent refusal of the Sixth Circuit to inquire into those facts cannot be justified.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit.

Respectfully submitted,

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Dated: September 13, 1973.

APPENDIX

ORDER

(U. S. Court of Appeals—Sixth Circuit)

(Filed May 17, 1973)

Before: Peck, McCree and Kent, Circuit Judges.

This appeal having been referred to a panel pursuant to Rule 3, Rules of the Sixth Circuit;

And upon consideration, it appearing that the questions presented do not require further argument;

IT IS ORDERED that the judgment of the District Court be affirmed, Rule 8, Rules of the Sixth Circuit.

Entered by Order of the Court

James A. Higgins,
Clerk.

ORDER

(U. S. Court of Appeals—Sixth Circuit)

(Filed June 27, 1973)

Before: Peck and McCree, Circuit Judges.

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the previses,

IT IS ORDERED that the petition for rehearing be, and it is, hereby denied.

Entered by order of the Court.

James A. Higgins,
Clerk.

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AVONSIDE NURSING HOME, INC., PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole issue presented is whether this suit was properly dismissed by the courts below for petitioner's failure to exhaust its administrative remedies.

Petitioner, Avonside Nursing Home, applied in 1966 to participate as an extended care facility in the Health Insurance for the Aged (Medicare) Program, 42 U.S.C. 1395, *et seq.* By agreement with the Secretary of Health, Education, and Welfare, Avonside became an approved "provider of services" in 1967, and on several occasions thereafter was reimbursed by the Department for services furnished Medicare beneficiaries. In 1970 the ownership of the corporate stock changed hands, but the corporation continued to do business as "Avonside Nursing Home" and took no steps to comply with 42 U.S.C. 1395cc(b)(1) which permits a provider of services to

terminate voluntarily its agreement by giving the public notice required by HEW regulations. The 1967 agreement, therefore, continued in full force and effect.

In October, 1971, the Secretary advised Avonside that its provider agreement was being terminated pursuant to 42 U.S.C. 1395cc(b)(2) because it no longer substantially met the conditions of participation prescribed for the Medicare Program. Avonside protested that the agreement had already been terminated as a result of the change of ownership of its corporate stock. The nursing home requested an administrative hearing, a hearing examiner was appointed, and a pre-hearing conference was held, at which the hearing examiner denied Avonside's request that he issue a subpoena *duces tecum* for certain records of the Department.[1] Immediately thereafter Avonside brought this suit for injunctive relief seeking a declaration that its provider of services agreement was a nullity, and an order restraining the Department from conducting administrative hearings which petitioner alleged would be prejudicial to its participation in state programs. The complaint alleged, among other things, that because of the hearing examiner's refusal to issue the requested subpoena, petitioner could not obtain a fair hearing. The district court held that petitioner had failed to exhaust its administrative remedies and dismissed the action. The court of appeals affirmed without opinion (Pet. App.).

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[1]The subpoena would have required the appearance of the Director of the Bureau of Health Insurance of the Social Security Administration, and the production of all the records in the Bureau relating to waivers granted by any State or by the Bureau for facility deficiencies under Medicare.

The Medicare Act, 42 U.S.C. 1395ff(c), entitles an aggrieved provider of services to a hearing and to judicial review of the Secretary's determinations. However, the Act contemplates review only for a "final decision of the Secretary made after a hearing" pursuant to 42 U.S.C. 405(g), as is evidenced by 42 U.S.C. 405(h) which pertinently provides that "[n]o findings of fact or decisions of the Secretary shall be reviewed by any person, tribunal or governmental agency except as herein provided."

Since petitioner had a statutory right of administrative review, followed if necessary by judical review, which it had not exercised, the district court properly dismissed the suit for injunctive relief for failure to exhaust administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51. All the issues raised in petitioner's complaint, including the Secretary's alleged lack of jurisdiction and the hearing examiner's refusal to issue the requested subpoena, should have been initially resolved at an administrative hearing. *Petroleum Exploration, Inc.* v. *Public Service Commission,* 304 U.S. 209; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Myers* v. *Bethlehem Shipbuilding Corp., supra.*

McKart v. *United States,* 395 U.S. 185, upon which petitioner relies for the proposition that exhaustion of remedies is not essential, is inapposite on its facts. That case, unlike the instant case, did not involve a premature resort to the courts where an administrative remedy was available. Indeed, the Court in *McKart* expressly noted that "all administrative remedies are now closed to petitioner" (395 U.S. at 196-197). Moreover, in *McKart* the Court pointed out that exhaustion of remedies is traditionally required where the relevant statute provides that certain administrative procedures

shall be exclusive, where it is necessary to permit the agency to develop the necessary factual background for a determination of the issues upon which a judicial decision must be based, and where the agency is entitled to exercise its expertise with respect to matters clearly within its jurisdiction (395 U.S. at 193-194). All of these factors are relevant here.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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[2]Petitioner's contention that the district court should have assumed jurisdiction under the Freedom of Information Act, 5 U.S.C. 552, was first raised in its petition for rehearing in the court of appeals. It is, in any event, without merit, since the suit was not brought to compel the production of documents requested under that Act. Although petitioner alleged that it would be unfair to conduct the hearing unless the subpoena *duces tecum* it had requested was issued, no request for documents under the Freedom of Information Act was ever made to the agency, and no claim that the Freedom of Information Act required the disclosure of the documents was made to the district court. Thus, this case does not involve the question of the district court's power to enjoin ongoing agency proceedings pending the determination of Freedom of Information Act claims which is before this Court in *The Renegotiation Board* v. *Bannercraft Clothing Company, et al.*, No 72-822, argued October 17, 1973.